No. 83-1619

IN THE
# Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
*Petitioners,*

*v.*

GARY ASSON, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

## REPLY BRIEF OF PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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The briefs in opposition[1] demonstrate why this petition, involving the five Idaho municipal participants, should be deferred pending the decision of the Washington Supreme Court in the main litigation involving all the participants in the $2.25 billion bond default of the Washington Public Power Supply System. Petitioners, of course, seek such deferral by motion filed with this petition on April 2, 1984.

[1] There are two briefs in opposition to the petition. The first was filed by respondent City of Heyburn, Idaho ("Heyburn Br."). The second was filed on behalf of all other respondents, including ratepayers and the four other Idaho cities involved ("Asson Br.").

1. *This Case Is Not Insignificant or Unrelated to the Main Washington Litigation.* Respondents disingenuously try to characterize the present case as small, uneventful state law litigation unrelated to the main Washington proceeding involving the default. It is true this case involves only five of the 88 participants. It involves less than two percent of the participants' obligations to the bondholders, as the respondents stress repeatedly. Also, the decision below purports to deal with the case entirely as a question of authority under Idaho law.

But none of this diminishes the significance of this case. Although the amount involved here may be a small portion of the vast sum at issue in Washington, it represents, nevertheless, approximately $43,000,000 in principal obligations of the Idaho cities to repay the bondholders' savings. The appropriation of those savings of private persons throughout the country by local authorities for public use raises important questions, particularly when the responsible parties have successfully sought to be relieved of all accountability by a local court applying local law without regard for Federal constitutional constraints.

Nor can respondents isolate this case from its context or dispute its relationship to the default and the main Washington proceeding which began before this case was instituted. The five Idaho municipal respondents contributed no less than any of the other participants to the course of conduct precipitating the default. The main Washington proceeding, in which the Idaho municipal respondents continue vigorously to litigate, alongside their fellow participants, will address all aspects of that extensive and concerted course of conduct. The main Washington proceeding contains Federal constitutional issues identical to those raised here. The Washington Supreme Court must address arguments that the Idaho municipal respondents have raised there in an effort to escape the very obligations at issue here.

The present petition is thus part of a much larger picture that this Court should have in view when considering the serious Federal issues raised by this case. Indeed, based on the

results to date in the Washington litigation, the respondent City of Heyburn "firmly maintains that the Idaho Supreme Court opinion . . . holding the Idaho cities without constitutional authority to enter into the contracts was superfluous and moot". (Heyburn Br. at 4.) Whether this Court should act on that suggestion of mootness by vacating the judgment or remanding for further consideration is yet another issue that is most appropriately addressed in conjunction with an assessment by this Court of the Washington Supreme Court's decision, once it has issued.

2. *The Present Case Raises Serious Federal Constitutional Issues.* Respondents contend that this case does not involve "known, traditional property rights". (Asson Br. at 16.) To the contrary, this case involves the appropriation—for respondents' benefit—of the savings of many innocent private individuals. Few property rights are better "known" or more "traditional" than those preventing the confiscation of private funds for public purposes.

Respondents further contend that there has been no "prior positive action" affording the bondholders a "reasonable expectancy" that their property would be protected. (Asson Br. at 16.) This assertion inexplicably ignores municipal respondents' express, written assurances, backed by opinions of their counsel, of their authority to guarantee repayment of the bond purchasers' funds. Those written assurances were repeatedly extended for more than four years while 14 separate issues of bonds were sold. Municipal respondents provided those assurances precisely in order to create the expectations that would in turn induce private financing of respondents' public venture. But for those assurances, that public venture could not have been undertaken.

Respondents also claim that there has been no "municipal action depriving any party of property". (Asson Br. at 17.) In fact, reacting to the failure of the project on which they expended private funds, municipal respondents sought to abrogate any obligation to return all or any portion of the bond-

holders' stake. It would be difficult to conceive of a more effective appropriation of private property.

Finally, respondents contend that the present case "turns completely on an interpretation of local, Idaho constitutional law". (Asson Br. at 19.) This assertion mistakenly supposes that the Federal Constitution imposes no constraints on the manner in which state law may be applied to impair established rights. When government purposefully creates expectations to induce investment for its own benefit, it may not then both destroy those expectations and appropriate the investment for itself. *E.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175, 179 (1979). By applying state law to authorize such improper conduct, the court below achieved a result that the Federal Constitution precludes.

That result is rendered especially egregious by the violent alteration of local law through which it was accomplished. The decision below was not dictated by a "70-year-old line of authority" as most of the respondents contend.[2] (Asson Br. at 12.) As the respondent City of Heyburn expressly concedes, the Idaho Supreme Court "seems to have ruled contrary to the previously announced tests for constitutionality of such agreements set forth in [citation] without overruling it or adequately distinguishing it". (Heyburn Br. at 2.) Similarly, the opinion of

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[2] The "70-year-old line of authority" that respondents discuss does not even address, much less support, the ruling that effected the startling change in law at issue here. That crucial ruling severely contracted the scope of the "ordinary and necessary" expense provision of Article 8, Section 3 of the Idaho Constitution. By contrast, respondents' discussion of Idaho precedent focuses on Idaho's treatment of the "special fund" doctrine. (Asson Br. at 10-12.) That doctrine has no bearing whatsoever on the "ordinary and necessary" expense provision that the court below narrowed in a surprising, *ad hoc* fashion. Nor does it in any way address the failure of the court below to apply alternative, equitable state law remedies, such as restitution, advanced by petitioners.

the dissenting justice of the Idaho Supreme Court described the opinion of the majority as follows (Appendix A at A-21):

> "It is only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case."

Indeed, if the "70-year-old line of authority" was so clear, why did the municipal respondents *themselves* issue express and comprehensive written assurances stating that they possessed authority to secure the bond purchasers' funds? Respondents do not explain how they could have issued and adhered to these assurances for more than four years if, as they now claim, a "70-year-old line of authority" made clear their lack of power to join the participants' common venture. For the reasons stated, and under the authorities cited in the petition at 11-13, local law cannot be fundamentally redefined so as to have preclusive effect upon preexisting Federal constitutional rights. Again, these serious constitutional issues are best considered in the context of the forthcoming decision of the Washington Supreme Court in the main litigation.

3. *Deferral Will Not Prejudice Respondents.* Respondents do not, and cannot, claim that deferral of the petition will prejudice them in any way. As they acknowledge, the Idaho municipal respondents are parties in the main Washington case, where they hope to get relief in addition to that already given them by the Idaho Supreme Court. On the other hand, the denial of the petition at this stage, before the final decision in the main Washington case, would prejudice petitioners by precluding a review of the holding below. Since consideration as to whether such review is appropriate can best be made when the main Washington decision is available, the matter should be left open pending that decision.

**Conclusion**

The foregoing considerations—the close relationship between the two cases (including the identity of the substantial Federal constitutional questions raised by petitioners in each case), the suggestion of the City of Heyburn of mootness arising from the lower court decision in the main Washington case, and respondents' failure even to contend that they would suffer prejudice if review of this petition should be deferred—suggest the appropriateness of deferring consideration of this petition pending the forthcoming decision in the Washington Supreme Court case involving all participants to the nuclear power projects and the resulting $2.25 billion default. Accordingly, and for the reasons stated in the petition and motion to defer, the consideration of this petition should be deferred until the forthcoming Washington Supreme Court case is available and this Court can consider any petition for a writ of certiorari to review it.

June 12, 1984.

Respectfully submitted,

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